Kessler Institute for Rehabilitation *and* Jersey Nurses' Economic Security Organization of the New Jersey State Nurses' Association. Case 22-CA-8243

April 16, 1981

DECISION AND ORDER

Upon a charge filed on February 28, 1978, by Jersey Nurses' Economic Security Organization of the New Jersey State Nurses' Association (JNESO), herein called the Union, and duly served on Kessler Institute for Rehabilitation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on March 3, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 9, 1978, following a Board election in Case 22-RC-7329, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 17, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. The complaint also alleges that on or about February 2, 1978, and at all times thereafter, the Union has requested Respondent to furnish it with data relating to rates of pay, hours, benefits, and other working conditions of employees in the appropriate unit; and that, commencing on or about February 17, 1978, and at all times thereafter, Respondent has refused and continues to refuse to furnish the requested data to the Union. On March 13, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 27, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 4, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause and a Cross-Motion for Summary Judgment.

Thereafter, on March 30, 1979, the Board issued its Decision in *Sierra Vista Hospital, Inc.*,[2] establishing a revised standard to be used in evaluating an employer's claim that a labor organization should be disqualified from representing said employer's employees because of the participation of supervisors in that labor organization. The Board in *Sierra Vista* indicated that the participation of supervisors in a labor organization can create "conflict-of-interest" problems that may, in certain circumstances, disqualify that labor organization from serving as the representative of a particular employer's employees.[3]

In response to the complaint's allegation that it had unlawfully refused to bargain with the Union, Respondent raised as an affirmative defense in its answer that JNESO is dominated and controlled by supervisors and, as such, is ineligible for certification as the collective-bargaining representative of the nurses employed by Respondent. Furthermore, Respondent based its Cross-Motion for Summary Judgment on the same grounds. Consistent with the procedure adopted in *Sierra Vista*, the Board, on August 21, 1979, issued an order denying the Motions for Summary Judgment,[4] reopening and consolidating the underlying representation proceeding with the unfair labor practice proceeding, and remanding the representation proceeding for a hearing before a hearing officer on the issue of whether or not supervisory participation in JNESO disqualified that labor organization from serving as the representative of the nurses employed by Respondent. Pursuant to the Board's order, a hearing was held before a duly designated hearing officer. On December 26, 1979, the Hearing Officer issued his report finding that Respondent failed to establish that JNESO is disqualified from representing Respondent's employees because of a conflict of interest, recommending that Respondent's request that the Board withdraw JNESO's prior certification be denied and further recommending that the Board reaffirm JNESO's certification as representative of Respondent's nurses in the appropriate unit. Respondent filed exceptions to the Hearing Officer's report, but the Board's Executive Secretary's Office rejected and returned those exceptions be-

[1] Official notice is taken of the record in the representation proceeding, Case 22-RC-7329, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] 241 NLRB 631 (1979) (Member Truesdale dissenting in part).

[3] *Id.* at 633-636.

[4] The motions were denied with leave to renew without prejudice.

255 NLRB No. 122*

*Vacated by Order dated April 19, 1982.

cause they were not timely filed in accordance with the Board's Rules and Regulations, Series 8, as amended. On January 17, 1980, Respondent filed an appeal to the Board from the Associate's Executive Secretary's ruling that the exceptions had not been timely filed. Thereafter, by telegraphic order dated February 4, 1980, the Board denied Respondent's request for leave to appeal from the refusal to accept, as timely filed, its exceptions to the Hearing Officer's report. On September 15, 1980, the Board issued an order adopting the Hearing Officer's report and reaffirming the Union's certification.

On October 30, 1980, counsel for the General counsel filed directly with the Board a renewed Motion for Summary Judgment. Subsequently, on November 13, 1980, the Board issued an order transferring the proceeding to the Board and Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On that same date Respondent filed a renewed Cross-Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motions for Summary Judgment

In its answer to the complaint and its Cross-Motion for Summary Judgment, Respondent repeats the argument, raised previously in the underlying representation proceeding, that the Union's certification is invalid because that organization is dominated and controlled by supervisors and, as a result, is disqualified from acting as the representative of Respondent's employees in the appropriate unit. The General Counsel contends that all material issues were previously raised in the representation proceeding, and that there are no litigable issues of fact requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including the record in Case 22-RC-7329, discloses that the Regional Director for Region 22 issued a Decision and Direction of Election on December 16, 1977. Respondent filed a request for review of the Regional Director's Decision and Direction of Election and the Board, on January 19, 1978, denied the request for review on the ground that it raised no substantial issues warranting review. An election was conducted on January 27, 1978; the tally showed 23 votes cast for, and 7 against, the Union, with 1 challenged ballot. On February 9, 1978, the Regional Director for Region 22 issued a Certification of Representative certifying the Union as the exclusive representative of all Respondent's employees in the appropriate unit. Furthermore, as described above, the Board subsequently reopened the representation proceeding in order to reexamine Respondent's contention that JNESO's certification was invalid because of an alleged disqualifying conflict of interest. After completing its reexamination of Respondent's conflict-of-interest contentions, the Board reaffirmed its prior certification of the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[6] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny Respondent's Cross-Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a nonprofit corporation duly organized under, and existing by virtue of, the laws of the State of New Jersey. At all times material herein, Respondent has maintained its principal office and place of business at 1199 Pleasant Valley Way, West Orange, New Jersey, where it has been continuously engaged in providing health care services and performing rehabilitative and other related services. In the course and conduct of Respondent's business operations during the preceding 12 months, said operations being representative of its operations at all times material herein, Respondent received gross revenues valued in excess of $250,000. During the same period of time, Respondent received goods valued in excess of

[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[6] As noted above, Respondent's exceptions to the Hearing Officer's report in the underlying representation proceeding were not timely filed in accordance with the provisions of the Board's Rules and Regulations, Series 8, as amended. Thus, Respondent had the opportunity to litigate fully its contentions with regard to the conflict-of-interest issue in that proceeding simply by filing timely exceptions. It failed to do so. Accordingly, Respondent is precluded from relitigating that issue in this proceeding.

$50,000 which were transported in interstate commerce to its place of business directly from States in the United States other than the State of New Jersey.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Jersey Nurses' Economic Security Organization of the New Jersey State Nurses' Association is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time registered nurses and graduate nurses employed by Respondent at its facility, including those registered nurses and graduate nurses employed as activities of daily living (ADL) nurses, neurology nurses, education coordinators and utilization review coordinators, but excluding director and assistant director of nursing, evening supervisors, night supervisors and director of ADL nurses, and all other professional employees (other than registered nurses), technical employees, service and maintenance employees, clerical employees, guards, and supervisors within the meaning of the Act and all other employees.

2. The certification

On January 27, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on February 9, 1978, and that certification was reaffirmed by the Board's order of September 15, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Requests To Bargain and Provide Information and Respondent's Refusals*

Commencing on or about February 2, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 17, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit. In addition, commencing on or about February 2, 1978, the Union has requested Respondent to furnish it with data relating to rates of pay, hours, benefits, and other working conditions of employees in the appropriate unit. Commencing on or about February 17, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to furnish the Union with the requested data relating to rates of pay, hours, benefits, and other working conditions of employees in the appropriate unit.

Accordingly, we find that Respondent has, since February 17, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. We shall further order Respondent to furnish the Union, upon request, with data relating

to rates of pay, hours, benefits, and other working conditions of employees in the appropriate unit.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Kessler Institute for Rehabilitation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Jersey Nurses' Economic Security Organization of the New Jersey State Nurses' Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time registered nurses and graduate nurses employed by Respondent at its facility, including those registered nurses and graduate nurses employed as activities of daily living (ADL) nurses, neurology nurses, education coordinators, and utilization review coordinators, but excluding director and assistant director of nursing, evening supervisors, night supervisors, and director of ADL nurses, and all other professional employees (other than registered nurses), technical employees, service and maintenance employees, clerical employees, guards, and supervisors within the meaning of the Act and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 9, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 17, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by refusing on or about February 17, 1978, and at all times thereafter, to furnish the Union with data relating to the unit employees' rates of pay, hours, benefits, and other working conditions, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusals to bargain and to supply requested data, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Kessler Institute for Rehabilitation, West Orange, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Jersey Nurses' Economic Security Organization of the New Jersey State Nurses' Association as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time registered nurses and graduate nurses employed by Respondent at its facility, including those registered nurses and graduate nurses employed as activities of daily living (ADL) nurses, neurology nurses, education coordinators and utilization review coordinators, but excluding director and assistant director of nursing, evening supervisors, night supervisors and director of ADL nurses, and all other professional employees (other than registered nurses), technical employees, service and maintenance employees, clerical employees, guards, and supervisors within the meaning of the Act and all other employees.

(b) Refusing to furnish the above-named labor organization with data relating to the unit employees' rates of pay, hours, benefits, and other working conditions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, furnish the above-named labor organization with data relating to the unit employees' rates of pay, hours, benefits, and other working conditions.

(c) Post at its West Orange, New Jersey, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Jersey Nurses' Economic Security Organization of the New Jersey State Nurses' Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to furnish the above-named Union with data relating to the rates of pay, hours, benefits, and working conditions of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, furnish the above-named Union with data relating to rates of pay, hours, benefits, and working conditions of the employees in the bargaining unit described below.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time registered nurses and graduate nurses employed by the Employer at its facility, including those registered nurses and graduate nurses employed as activities of daily living (ADL) nurses, neurology nurses, education coordinators and utilization review coordinators, but excluding director and assistant director of nursing, evening supervisors, night supervisors and director of ADL nurses, and all other professional employees (other than registered nurses), technical employees, service and maintenance employees, clerical employees, guards, and supervisors within the meaning of the Act and all other employees.

KESSLER INSTITUTE FOR REHABILITATION